IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHANNON ZOLLER and ALEXANDER BEIGELMAN, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **UBS SECURITIES LLC, UBS FINANCIAL SERVICES INC., and UBS AMERICAS INC.,** **Defendants.**	Case No. 1:16-CV-11277 Honorable Milton I. Shadur

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO DISMISS WITHOUT PREJUDICE AND WITH LEAVE TO REINSTATE

Defendants UBS Americas Inc., UBS Financial Services Inc., and UBS Securities LLC (collectively, "UBS" or "Defendants"), hereby respond to Plaintiffs' Motion to Dismiss and With Leave to Reinstate Within 30 Days After Supreme Court Ruling, Dkt. No. 17, as follows:

Defendants contend that the complaint should be dismissed outright: It is fatally flawed and should be dismissed regardless of the Supreme Court's decision in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) *cert. granted*, 2017 WL 125664, at *1 (U.S. Jan. 13, 2017) (No. 16-285). Indeed, Defendants' concerns with the complaint are such that Defendants had advised Plaintiffs they would seek Rule 11 sanctions if the complaint were not dismissed. Accordingly, and for reasons explained below, Defendants ask that the complaint be dismissed with an admonition that regardless of the outcome in *Lewis*, Plaintiffs not file the same or a similar complaint without reviewing the facts and applicable law in accordance with Federal Rules of Civil Procedure 8 and 11. Likewise, the Court should grant Plaintiffs no special "leave to reinstate" the case beyond what otherwise is authorized by the Federal Rules of Civil Procedure and other applicable legal requirements.

By way of further background, Defendants state as follows:

1. This is a purported class action by two Plaintiffs—Shannon Zoller and Alexander Beigelman. Neither of these Plaintiffs has a viable basis for proceeding with their claims against UBS in this Court. Indeed, as Defendants explained to the Court at the status conference on February 3, 2017, Defendants intended to move for Rule 11 sanctions if the complaint were not dismissed voluntarily. *See* Dkt. No. 12, Hrg. Tr. 6:20-21.

2. With respect to Plaintiff Zoller, she signed a general release of "any and all claims" against UBS when she left the Firm in 2013, in exchange for a $51,923 severance payment that she accepted and has not offered to return. *See* Ex. 1 (Apr. 12, 2013 S. Zoller Release) ¶ 6. The complaint does not (and could not) set forth any basis on which the release could be challenged, nor does it establish that Zoller's claims are somehow outside the scope of the release; indeed, the complaint makes no mention whatsoever of the existence of this release. *See White v. Gen. Motors Corp.*, 908 F.2d 675, 682 (10th Cir. 1990) (explaining that Rule 11 sanctions were appropriate where plaintiff brought released claims and plaintiff's only "argument that the releases were void" was "frivolous"); *Bautista v. Star Cruises*, 696 F. Supp. 2d 1274, 1280 (S.D. Fla. 2010) (imposing sanctions based on "Plaintiffs' counsel's failure to inform the Court of the existence of the settlements and signed releases, not just a material fact but the dispositive fact").

3. Plaintiff Beigelman, for his part, signed a mandatory arbitration agreement with UBS that requires him to arbitrate "all disputes" before the Financial Institution Regulatory Authority ("FINRA") and in April 2015, he did just that, himself initiating—through the same

counsel representing him in this case—a FINRA arbitration in New York, asserting nearly verbatim almost all the same claims he now asks this Court to resolve. *See* Ex. 2 (*Beigelman v. UBS*, FINRA Arb. No. 15-00953, Compl., filed Apr. 27, 2015). Indeed, the very day he filed his complaint in this Court, Beigelman's counsel wrote UBS's arbitration counsel to request dates for the FINRA hearing. Ex. 3 (Dec. 12, 2016 Email from P. Bronte to J. Miller et al.).

4. Because Zoller unequivocally released all claims against UBS, and because all of Beigelman's claims are subject to mandatory arbitration before FINRA, this case merits dismissal. And as UBS has explained to Plaintiffs' counsel, dismissal of Beigelman's claims would be required even if the Supreme Court were to affirm the Seventh Circuit's decision in *Lewis*. That is in part because *Lewis* rests on the right of employees covered by Section 7 of the National Labor Relations Act ("NLRA") to engage in "concerted activities" for "mutual aid and protection." *See Lewis*, 823 F.3d at 1153-54. However, Beigelman was a supervisor at UBS, not an "employee" covered by Section 7. *See* 29 U.S.C. § 152(3), (11) (defining "employee" in the NLRA to exclude "any individual employed as a supervisor," meaning any individual with "authority . . . to . . . reward, or discipline other employees, or responsibly to direct them"); *and see* Ex. 2 at 7 (Beigelman's FINRA arbitration demand describing the process by which he "allocated bonuses to his direct reports"). Indeed, Beigelman held the rank of Managing Director, which is the second-highest rank at UBS.

5. Because Beigelman waived his right to bring class action claims against UBS, agreed to arbitrate all claims against UBS, is actively doing so at his own initiative, and is not an "employee" under Section 7, there is no non-frivolous basis for his pursuit of any claims in this Court—whether individual, or on behalf of a class—even if *Lewis* is affirmed.

6. It should also be noted that while Beigelman has attempted to skirt his arbitration agreement by purporting to bring class claims, the complaint's class allegations are patently deficient. For example, Plaintiffs purport to bring a class claim for breach of contract on behalf of themselves and all other "similarly situated" UBS employees nationwide, but fail to identify what contracts allegedly were breached. *See* Compl. ¶ 52. And Plaintiffs advance allegations that plainly are not susceptible to class-wide treatment—and for which they could not possibly have a good faith factual basis. *See e.g., id.* ¶ 61 ("Plaintiffs *and all others similarly situated* acted in accordance with their contracts and/or agreements *at all times* . . ."); *id.* ¶ 77 ("Plaintiffs *and all others* similarly situated *relied* on such promises . . .") (emphases added). Further, Beigelman brings a class-wide claim under the Age Discrimination in Employment Act ("ADEA"), but does not set forth *a single fact* to show how UBS's alleged failure to pay him a bonus, deferred incentive compensation, or severance was related to his age. *Id.* ¶ 98. Beigelman cannot evade his agreement to arbitrate "any disputes" with UBS by couching inherently individualized claims regarding his bonus, deferred incentive compensation, and severance as purportedly brought on behalf of a class.*

7. Finally, contrary to the suggestion in their motion, Plaintiffs should be granted no special "leave to reinstate" this case after the *Lewis* case is decided, and they have identified no basis for their vague suggestion of a "stay." *See* Dkt. No. 17 ¶ 4. Rather, Plaintiffs should be permitted to file a new complaint only to the extent permitted by the Federal Rules and other applicable legal requirements, and should be given no additional license or reprieve.

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* During the status conference before this Court, Plaintiffs' counsel stated that this lawsuit was filed in part because of Beigelman's dissatisfaction with "the manner in which [the FINRA arbitration] has been proceeding and [UBS's] unwillingness to participate." *See* Dkt. No. 12, Hrg. Tr. 5:11-13. Of course, the filing of a lawsuit in federal court in Illinois is plainly not an appropriate means of addressing any concerns that Beigelman or his counsel may have regarding a pending FINRA arbitration in New York. (Moreover, there was no basis in fact for Plaintiffs' counsel's statement that UBS was unwilling to participate in the arbitration).

8. For all of these reasons, while Defendants support dismissal of the complaint, they oppose and object to Plaintiffs' filing of this frivolous complaint in the first instance, and respectfully submit that the Court should dismiss the complaint with an admonition that regardless of the outcome in *Lewis*, Plaintiffs not file the same or a similar complaint without reviewing the facts and applicable law in accordance with Federal Rules of Civil Procedure 8 and 11.

DATED: March 9, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2017, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which provided electronic service upon:

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